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No. 02-1350

IN THE

Supreme Court of the United States

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Petitioner,

v.

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, UTAH NATIONAL ORGANIZATION FOR WOMEN, AND CRAIG S. AXFORD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND THE NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

This brief is filed on behalf of the National League of Cities ("NLC"), the International Municipal Lawyers Association ("IMLA"), and the National Association of Counties ("NACo").

The NLC is a non-profit organization whose members include 49 state municipal leagues and approximately 1,800 member cities and towns. Through the member state municipal leagues, NLC also represents more than 18,000 municipalities.

The IMLA is a non-profit organization that has served as an advocate for local government attorneys since 1935. Its members include lawyers from more than 1,400 local governments. IMLA serves as the legal voice for the nation's local governments and thus has a vital interest in legal issues that affect municipalities.

The NACo, created in 1935, has a membership of more than 2,000 counties representing over 80 percent of the nation's population. NACo is the only national organization in the United States that represents county governments. It provides legislative research and technical assistance to counties and serves as a national advocate for counties before the executive, legislative, and judicial branches of the federal government.

Amici's members have a vital interest in protecting local governments' authority to acquire, manage, and sell property in the manner that best promotes the interests of

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

the public. Those interests are directly implicated by the questions presented in the petition.

SUMMARY OF ARGUMENT

For hundreds of years, local governments throughout the country have been securing limited easements authorizing pedestrian passage across private property. *See, e.g., Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 & n.1 (1987) (recognizing that passage-only easement sought by government commission was "a classic right-of-way easement"). Such easements facilitate access to businesses, beaches, and parks. *See, e.g., id.* at 834-35. Until the Tenth Circuit issued its decision in this case, local governments had every reason to believe that private landowners who agreed to convey such limited-purpose easements could retain the authority to restrict expressive activity on their property. That is no longer true.

Under the Tenth Circuit's analysis, a pedestrian passage easement can subject a private landowner's restrictions on speech to First Amendment scrutiny when the easement is "intended to provide passage through, not to, [the private] property." Pet. App. at 26a. By resting its First Amendment analysis on the "similarity" of a pedestrian passage easement across private property to "public sidewalks"—despite the "city's express intent not to create a public forum"—the Tenth Circuit has fundamentally misconstrued this Court's precedents, issued a decision in conflict with the governing standards in other jurisdictions, and created substantial uncertainty that directly impairs the ability of *amici*'s members to negotiate real estate transactions with private landowners. *See* Pet. App. at 28a. At its core, the decision below fundamentally contradicts two key principles of property law: (1) that an easement created by express grant is limited to the purposes and uses established by the precise terms of the grant and (2) that

the owner of an easement is entitled to use the property only to the extent reasonably necessary to accomplish the express purposes set forth in the grant.[2]

This Court should grant certiorari. Resolution of the questions presented in the petition is especially important because "[t]his Court has traditionally recognized the special need for certainty and predictability where land titles are concerned." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979).[3]

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE LEGAL UNCERTAINTY CREATED BY THE DECISION OF THE TENTH CIRCUIT

A. The Tenth Circuit's Decision Has Created Substantial Uncertainty By Disregarding The Lines Drawn By This Court's Precedents

Prior to the decision below, local governments were able to rely on certain bedrock First Amendment principles established and reaffirmed by this Court when negotiating real estate transactions with private parties. Under this Court's precedents, "the constitutional guarantee of free

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[2] *See, e.g.*, Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 8:02[1], at 8-3 (rev. ed. 1995) ("When precise language is employed to create an easement, such terminology governs the extent of usage."); *Restatement (Third) of Property: Servitudes* § 1.2(1) & cmt. d (2000) (noting that owner of an easement "is entitled to make only the uses reasonably necessary for the specified purposes" set forth in the grant); *Labrum v. Rickenbach*, 711 P.2d 225, 227 (Utah 1985) ("[T]he law in this state is plain: A right of way founded on a deed or grant is limited to the uses and extent fixed by the instrument.").

[3] *Amici* share petitioner's view that it would be appropriate to grant, vacate, and remand the decision if this Court resolves the public forum issue presented in *Virginia v. Hicks*, 123 S. Ct. 990 (2003) (granting certiorari). *See* Pet. at 17-19.

expression has no part to play" when a private landowner permits pedestrian access to its property on terms that restrict speech,[4] unless "the State has attempted to avoid its constitutional duties by a sham arrangement which attempts to disguise provision of public services as acts of private parties."[5] The Court of Appeals' failure to adhere to these settled principles has circumscribed the legitimate authority of local governments to secure passage-only easements in the Tenth Circuit and has created uncertainty concerning the authority of local governments throughout the country.[6]

One of the fundamental flaws in the Tenth Circuit's analysis is its application of public forum principles to restrictions on expressive conduct imposed by a private landowner on its own property—conduct beyond the reach of the First Amendment. Under the express terms of the limited easement, the Church—not the City—imposed the speech restrictions at issue here. *See* Pet. App. at 89a (warranty deed stating that the Church possessed the right to deny access to persons engaging in expressive activity inconsistent with the religious nature of the property).

This Court has repeatedly explained that the First Amendment is only implicated when restrictions on speech are imposed by (or on behalf of) the government. *See, e.g.*, *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (holding that

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[4] *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976).

[5] *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 n.7 (1982).

[6] *See, e.g.*, Molly McDonough, *Defining a Public Space: Courts Interpret the Meaning of "Traditional Public Forum,"* 89 A.B.A.J. 24 (2003) (noting unsettled state of First Amendment law in private-public property deals and specifically recognizing disparate results reached in the decision below and *Hotel Employees & Restaurant Employees Union, Local 100 v. City of New York Department of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002)).

picketers at private shopping mall could be arrested for trespass without implicating First Amendment because "the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state"); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566 (1995) (noting that First Amendment's free speech guarantees "guard only against encroachment by the government and 'erec[t] no shield against merely private conduct'" (citation omitted) (alteration in original)).

Moreover, this Court explicitly rejected the premise that private parties who allow public passage across their property should be subject to the strictures of the First Amendment. Although this Court initially concluded in *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 318-20 (1968), that private property should be considered a public forum where the property was "'freely accessible and open to the people in the area and those passing through'" (citation omitted), that interpretation of the First Amendment was short lived. Twice in the next decade—first implicitly, then explicitly—the Court reversed course and overruled *Logan Valley*, holding that the First Amendment does *not* apply to restrictions on expressive activity imposed by a private property owner who permitted public passage. *See Hudgens*, 424 U.S. at 517-18 (explaining that *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), implicitly overruled *Logan Valley*); *Lloyd Corp.*, 407 U.S. at 569 ("Nor does property lose its private character merely because the public is generally invited to use it for designated purposes."). The Tenth Circuit accordingly should have followed this Court's mandate that the First Amendment has "no part to play" in the decision of a private landowner to restrict expressive

conduct on property generally open to the public, including those "passing through." *Hudgens*, 424 U.S. at 519-21.

Nothing in this Court's cases suggests that a different outcome was required because the pedestrian passage at issue here was authorized by a limited purpose easement instead of a license issued by the landowner. *See, e.g., Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 829 (1996) (Thomas, J., concurring in part and dissenting in part) ("[O]ur cases have limited the government's ability to declare a public forum to property the government owns outright, or in which the government holds a significant property interest *consistent with the communicative purpose of the forum to be designated.*" (emphasis added)). The parties here specifically disclaimed an intent to create a public forum, and the warranty deed itself confirms that creation of a public forum was flatly inconsistent with the intended use of the property. Pet. App. at 87a-89a. Indeed, every Supreme Court case cited by the Tenth Circuit to justify its finding of a public forum burdened by the strictures of the First Amendment, save one inapplicable exception, involved restrictions on speech that were clearly and unequivocally imposed by the government—not by a private party.[7]

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[7] *See* Pet. App. at 11a-12a; *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 669 (1998) (restriction imposed by state-owned public broadcaster); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 795 (1985) (restriction imposed by Executive Order); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39 (1983) (restriction imposed by local school district); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 115-16 (1981) (restriction imposed by federal statute). The sole exception is *Marsh v. Alabama*, 326 U.S. 501, 502 (1946), which concerned the *sui generis* context of a company-owned town. The limited rule of *Marsh* plainly does not apply to the property at issue here. *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 & n.8 (1978) (explaining that *Marsh* allows "'private property [to] be treated as though it were public" for purposes

There accordingly was no state action implicated in the Church's decision to restrict expressive conduct on the plaza. *See, e.g., Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (holding that there is no state action unless the "'State is *responsible* for the specific conduct of which the plaintiff complains'" (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).[8] Local governments and private landowners are nevertheless now confronted with the prospect that the First Amendment can govern expressive activity on a wide array of private property encumbered by limited-purpose easements.[9]

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of state action analysis only in "extraordinary circumstances'" where the property "'has taken on *all* the attributes of a town, *i.e.*, "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block'"'" (citations omitted)).

[8] The district court opinion also confirmed that the City did not retain any involvement in the "maintenance or the operation of the Property." Pet. App. at 48a-49a & n.3 (footnote omitted); *see, e.g., Evans v. Newton*, 382 U.S. 296, 301 (1966) (state action found where transfer of property to private owner was sham designed to avoid constitutional prohibitions against discrimination and city exercised substantial management and control of property after transfer).

[9] The Tenth Circuit asserted that it was not adopting a bright line rule that would automatically convert all easements into public fora. *See* Pet. App. at 13a n.5. But the standards the court articulated, as well as the way those standards were applied to the facts of this case, create a substantial risk that many (if not most) pedestrian passage easements would be deemed to be public fora because of their functional "similarity" to "public sidewalks." Pet App. at 28a. If a right of way through a religious park, which is undefined by any metes and bounds, has sufficient "similarity" to a public sidewalk, then a court might also hold that any well-worn trail across private lands also has sufficient "similarity" to a sidewalk. And any easement that crosses private property and that previously had a sidewalk is virtually certain to constitute a public forum under the Tenth Circuit's standards. *See, e.g., id.*

B. The Decisional Conflicts Resulting From The Tenth Circuit's Opinion Create Uncertainty In The Realm Of Property Transactions Where Predictability Is Essential

The Tenth Circuit's decision squarely conflicts with the decision of the Nevada Supreme Court in *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243 (Nev. 2001). *See* Pet. at 15-16. In contrast to the Tenth Circuit, the Nevada Supreme Court correctly recognized that, absent very special circumstances not present here, a private landowner does not "'st[an]d in the shoes of the State'" when it restricts the expressive activities of pedestrians who travel across its property pursuant to the terms of a public access easement. *S.O.C., Inc.*, 23 P.3d at 248 (quoting *Hudgens*, 424 U.S. at 519). In addition, the petition further demonstrates that the tests adopted and applied by the Tenth Circuit and by the Second Circuit[10] to determine whether property should be characterized as a public forum are irreconcilably inconsistent. Pet. at 8-14.[11]

As a consequence of these inconsistent standards, local governments can no longer accurately gauge whether a minimal government interest in private property—such as a pedestrian passage easement—will transform private property into a public forum without regard to the parties' intent. *Compare Hotel Employees & Restaurant Employees Union, Local 100 v. City of N.Y. Dep't of Parks*

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[10] *Hotel Employees*, 311 F.3d at 546-47, 552.

[11] The Second Circuit's decision in *Hotel Employees* could not be resolved on the question of State action also at issue in this case and *S.O.C., Inc.* because the public restrictions on expressive activity on the public plaza adjacent to the Lincoln Center were imposed on behalf of the city. *Hotel Employees*, 311 F.3d at 541 (noting that Lincoln Center was licensed to manage the public plaza "'on behalf of and as an agent of the City'" (quoting License Agreement)).

& Recreation, 311 F.3d 534, 546-47, 552 (2d Cir. 2002) (holding that the "physical characteristics" of the property and its surroundings, the uses of the property, the parties' intentions with respect to property, and all other "relevant factors" are probative of the public forum inquiry) *with* Pet. App. 21a-22a (ignoring parties' intentions with respect to the property, the characteristics and use of a large portion of the property and its surroundings, and physical changes to the park in finding a public forum).

This case provides a paradigm illustration of why reasonable certainty is so essential in the realm of real property transactions. Consistent with state property law and this Court's First Amendment precedents, the City negotiated a transaction with the Church to sell the property at issue for $8.1 million; to close the preexisting public forum; and to retain a limited pedestrian passage-only easement. It is undisputed that the Church would not have purchased the property if the City had retained a public forum on the property. *See, e.g.*, Pet. at 3. In good faith reliance on the enforceability of these provisions, the Church invested millions of dollars to destroy the physical remnants of the public forum and to create a new plaza infused with religious imagery. *Id.* at 3-5.

Transactions of this nature obviously cannot be unwound fairly or effectively. Local governments and landowners accordingly need greater certainty than the state of the law currently provides so that transactions can be negotiated on the basis of predictable rules.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE TENTH CIRCUIT'S DECISION SERIOUSLY UNDERMINES THE ABILITY OF LOCAL GOVERNMENTS TO MANAGE PROPERTY IN THE PUBLIC INTEREST

Local governments own millions of parcels of real estate criss-crossed by sidewalks, streets, and other public fora.[12] It is commonplace for the City to negotiate sales of these parcels to private parties and to acquire or retain easements for pedestrian passage across private lands. The standards established by the Tenth Circuit's decision adversely affect these important interests in three fundamental ways.

First, the decision below will inhibit the ability of local governments to secure passage-only easements for the benefit of the public even though such easements have long been a staple of private and public property transactions.[13] Under the Tenth Circuit's reasoning, the City had only two choices if the Church was unwilling to permit expressive activities on its property: it could forego the sale of the property or forego the pedestrian passage easement. This is

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[12] *See, e.g.*, William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. Ill. L. Rev. 521, 544 n.96 (1986) (noting that, at time of article, local and state governments owned approximately 136 million acres of property).

[13] Recognizing the established principle that local governments must have the power to manage their property to effect their valid policy goals, states like Utah authorize local governments to contract for property interests to the same extent as private individuals. *See, e.g.*, 69 C.J.S. *Municipal Corporations* § 881 (1999) (noting that a local government may "acquire and hold all such property, real and personal, as may be necessary to the proper exercise" of its municipal functions); Utah Code Ann. § 10-8-2(1)(c)-(d) (providing municipal governments express authority to "purchase, receive, hold, sell, lease, convey, and dispose of real and personal property for the benefit of the municipality," and to "do any other thing in relation to [such] property that an individual could do").

not a sensible rule, particularly where, as here, there were miles of sidewalks in the immediate vicinity available to the public for expressive activity. *See, e.g.*, Pet. App. at 106a. A rule that permits the closure of the public forum but prevents the retention of an easement for passage does not serve the public interest.

Second, the standards established by the Tenth Circuit's decision will inevitably depress the value of local government property interests. Properties that must be transferred with public forum encumbrances are plainly worth far less. Private landowners are often willing to permit pedestrian passage, but few are interested in the disruptions attendant to demonstrations, picketing, and leafleting. *See, e.g., Lloyd Corp.*, 407 U.S. at 555-56, 570 (rejecting First Amendment challenge to private landowner's prohibition against handbilling, an activity "likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purposes" and "atmosphere" of the property); *see also Frisby v. Schultz*, 487 U.S. 474, 486-87 (1988) (noting that picketing of a private landowner is frequently "offensive and disturbing" and can have a "devastating effect" on its legitimate "'interest in the quality of [its] environment,'" particularly because the audience is captive (citation omitted)).

Third, the standards adopted by the Tenth Circuit are unworkable because they require local governments to become entangled with the speech-related activities of the owner. As the context of this case graphically demonstrates, the Tenth Circuit's decision raises the specter of a different First Amendment violation. By forcing the City to police speech on a religious plaza, the Tenth Circuit standards are generating the very type of "excessive government entanglement with religion" that

renders government action violative of the Establishment Clause. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 584-85 (1992) (restating test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). At the very least, the relationship required by the decision below may foster the perception that the City has endorsed the Mormon faith. *See, e.g., County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

In sum, the decision below does not cure constitutional problems. It creates them.

CONCLUSION

Amici respectfully urge this Court to grant the petition for a writ of certiorari and to reverse the decision of the court of appeals.

Respectfully submitted,

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